IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16709 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KAMLESHBHAI THAKORBHAI PARDIWALA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 16709 of 2003

MS SUBHADRA G PATEL for Petitioner No. 1

Ms Mita Panchal, AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 05/04/2004

ORAL JUDGEMENT

The petitioner has filed this petition under under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and

setting aside an order dated 21.10.2003 passed by respondent No.2 under section 3(2) of the Gujarat Prevention of Anti-social Activities At, 1985 (for short, 'the PASA Act') directing detention of the present petitioner on the grounds stated in the detention order.

2. It was alleged against the petitioner that two prohibition offences were registered before Athwaline police station C.R. No.140/2003 dated 28.6.2003 relating to offences punishable under sections 66(b), 65 (E) and DCB police station CR. No.5682/2003 dated 21.8.2003 relating to offence punishable under sections 66(1)(b), 65 (E) and section 81 of the Bombay Prohibition Act, 1949. It was alleged against the petitioner that two witnesses had given statements against the petitioner whose names were not disclosed to the detenu. On the strength of the aforesaid two registered offence and two unregistered cases, the petitioner was detained by respondent no.2.

3. The petitioner has challenged the impugned order of his detention on various grounds.

4. On receiving the petition, rule was issued and in response to the service of notice of rule, Ms.Mita Panchal, learned AGP appears on behalf of the respondents. I have heard the learned Advocates for the parties and have perused the papers.

5. The Learned Advocate for the petitioner contended that the statements of two unnamed witnesses considered by the detaining authority have been supplied to the petitioner, but the names of those witnesses have not been disclosed. It is her argument that with a view to observe the principle of natural justice, names of unnamed witnesses ought to have been disclosed to the petitioner. At this stage, learned AGP has contended that the detaining authority has a power of privilege to keep the names away from the petitioner in exercise of powers under section 9(2) of the said Act. She has, therefore, contended that the petitioner was not entitled to get the names of the said witnesses. It is true that under section 9(2) of the said Act, the detaining authority has a power of privilege to withhold the names of unnamed witnesses from the notice of the petitioner. At the same time, in order to claim the said privilege, there ought to be some credible material on the basis of which the said power of privilege can be exercised by the said authority. It is true that as per the records, the detaining authority had verified the statements of witnesses referred to above. However, it is not noticed

that the detaining authority had further verified form the records that the fear expressed by the said witnesses was correct and genuine. There appears to be no material before the detaining authority to come to a finding that the fear expressed by the witnesses, during the course of their statements, was real and genuine.

6. In order to substantiate the said argument, we may refer to a decision in the case of Kishore Naginbhai Parmar v. State of Gujarat & ors, reported in 2000(4) GLR 3236. There the detaining authority had claimed power of privilege under section 9(2) of the said Act. After considering many decisions, this Court in the above matter, came to a conclusion that, it cannot be said that either the grounds of detention or the affidavit-in-reply filed by the detaining authority disclose the grounds and reasons which were considered by the detaining authority for exercising powers under section 9(2) of the said Act. In that view of the matter, if the names of the witnesses have not been disclosed and if the power of privilege under section 9(2) of the said Act has been claimed and if there was no material before the detaining authority for coming to a finding about the correctness and genuineness and in that case, non-disclosure of the names of the witnesses would be fatal to the detention order on account of violation of principles of natural justice. The reason is that the names of witnesses have been withheld without proper exercise of powers under section 9(2).

7. Here the petitioner's valuable right under section 22(5) of the Constitution of India would stand deprived since effective representation could not be made without knowing the names of witnesses. Denial of such a right would be fatal to further continuance of the detention.

8. So far as the registered offences are concerned, the grounds for detention at Annexure 'B' at page 12 onwards show that a solitary offence under Bombay Prohibition Act was registered against the petitioner. It would be very difficult to accept that registration of solitary offence under the said Act would lead to a threat to public order or public health. In that view of the matter, even on this ground the order of detention cannot be sustained in the eye of law.

9. For the foregoing reasons this petition is allowed. The impugned order dated 21.10.2003 passed by respondent No.2 is ordered to be quashed and set aside. The detenu is ordered to be set at liberty forthwith, if

no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp